FILED
APR 24 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1194

JOHN C. BLACK,

Petitioner,

vs.

RICHFIELD OIL CORPORATION,

Respondent.

PETITION FOR REVIEW ON WRIT OF CERTIORARI OF A DECISION OF THE NINTH CIRCUIT COURT OF APPEALS.

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PETITION FOR REVIEW ON WRIT OF CERTIORARI OF A DECISION OF THE NINTH CIRCUIT COURT OF APPEALS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, JOHN C. BLACK, appellant in the court below, respectfully prays that a Writ of Certiorari issue to review the judgment entered in the above entitled cause on December 12, 1944, by the Honorable Circuit Court of Appeals for the Ninth Circuit, and as to which Judge Albert Lee Stephens filed his dissent. A rehearing was denied on January 29, 1945, Judge Stephens dissenting. In support of this petition, your petitioner respectfully represents:

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347 (a)).

Summary of Matters Involved.

This is an action for declaratory relief, wherein your petitioner seeks: (1) a *declaration* of the rights and obligations of himself as licensor, and of respondent as successor in interest of Pan American Petroleum Company as licensee, under a contract of license executed as of September 15, 1925; (2) *a reformation,* if necessary, of the writing executed in evidence of said grant; and (3) *an accounting* of royalties unpaid for the period subsequent to August 19, 1938 [Comp. Tr. p. 2].

On March 12, 1937 respondent, *as a rehabilitated debtor,* succeeded to the estate of the licensee under this grant, by means of a reorganization of the original licensee—Pan American Petroleum Company, under Section 77-B of the National Bankruptcy Act [Ex. 48, p. 157]. In these proceedings respondent expressly assumed and agreed to perform this *executory* contract. [Stip., Ex. No. 11, p. 4, Art. 11, pars. 1 and 4].

On September 15, 1925, Black was, and since January 1, 1920, had been, employed in the service of Pan American Petroleum and Transport Company [Pltf. Ex. 6, Tr. p. 1077], and of its wholly owned subsidiary—said Pan American Petroleum Company, as chief refinery superintendent, and as such he had charge of the construction and operation of important refineries situated at Tampico, Mexico; Destrehan, Louisiana, and Watson, California. Black continued in the employment of said Pan American

Petroleum Company until respondent succeeded to this license, and he then entered, and remained for about four months, in the employ of this respondent at Watson, California.

On September 15, 1925 your petitioner, Black, was the inventor and owner of multiple important inventions useful in petroleum refinery operations. These composed two groups: a *cracking* group containing about 140 inventions, both process and apparatus, and a *non-cracking* group containing about 75 inventions.

These *cracking* inventions included Black's important discovery that chrome alloy was resistant to the destructive action of sulphur or sulphur compounds in petroleum under cracking conditions; that its use in a cracking container would substantially eliminate the serious hazards to life and property then incident to petroleum cracking operations; would permit the use of higher temperatures and pressures, and would substantially improve the quantity and quality of the gasoline produced (*Gasoline Products Co. v. Coe*, 87 Fed. (2d) 550.) This discovery was of such fundamental importance that its use has become standard practice in the petroleum cracking industry under licenses granted under Black's patents.

Following this discovery and conception, Black filed two applications for letters patent in respect thereof. The first application [Tr. p. 1175] was filed October 25, 1922, and bears serial No. 596,837. The second application [Tr. p. 1193] was filed twelve days later—November 6, 1922—and bears serial No. 599,403. The inventions of this second application are the subject of this action.

These two applications disclose and rest upon the same basic inventive thought, namely, that the use of chrome

alloys in the process and containers wherein the petroleum is under cracking condition, substantially eliminates serious hazards to life and property, and greatly improves the quality and quantity of the gasoline produced.

Patent serial No. 1,815,428 was issued upon said application No. 596,837 on July 21, 1931 [Ptfs. Exch. 20, Tr. p. 1175] and later reissued as No. 19,237 [Ptfs. Exh. 21, Tr. p. 1183], and patent serial No. 2,075,164 was issued upon said application No. 599,403 on March 30, 1937 [Ptfs. Exh. 23, Tr. pp. 1193, 174, 176].

The delay in the issuance of said patent upon said application No. 599,403 resulted from a contest which was carried through the various patent agencies and the courts, and eventuated in a decision on December 7, 1936, by the United States Court of Appeal for the District of Columbia, which declared the patentability of said invention. (*Gasoline Products Co. v. Coe, supra.*)

On September 15, 1925, and prior thereto, said Pan American Petroleum Company, a subsidiary of said Pan American Petroleum and Transport Company, was engaged in the business of producing and refining petroleum and petroleum products, and in its operations *it was using* the inventions of each of said groups, including the inventions of said companion applications numbers 596,837 and 599,403, under a license granted by Black to said parent company on October 30, 1924.

Said Pan American Petroleum Company was then using the invention common to these two companion applications in its pilot cracking plant at its refinery at Watson, California [Tr. Vol. I, pp. 282, 283, 284; Vol. II, pp. 641, 643], and was preparing for its extensive use in the new cracking unit which it was planning for the same loca-

tion. It had ordered and received for such use about 24,000 pounds of chrome alloy tubes [Tr. Vol. I, pp. 286, 287].

On August 25, 1925, said Pan American Petroleum Company, in anticipation of a dissolution of its subsidiary relationship to said parent company, desired to continue its use of said inventions in the conduct of its business, and to obtain from Black the right to use any and all of the inventions, processes, and apparatus of which Black was the owner, and any and all improvements thereto, and inventions of a similar nature which Black might thereafter make. In accordance with said desire, said Pan American Petroleum Company, at Los Angeles, California, through its attorney, Olin Wellborn, Jr., wrote to Black at New York asking that he, Black, execute to it a contract of license upon a form of said agreement which said Olin Wellborn had prepared, and which he enclosed with said letter to Black. In this letter [Ptfs. Exh. 3, Tr. pp. 153, 232, 838 and 1062], Mr. Wellborn stated that his client, the Pan American Petroleum Company, thought it would be well to have a separate understanding with Black *"covering the use of your inventions."*

Upon receipt of said letter and enclosure, Black inserted the serial numbers of two applications which had been filed after the grant of said license to the parent company; executed the agreement, and returned the same to Mr. Wellborn. [Ptfs. Exh. 4, Tr. pp. 1063 and 223].

Thereafter, about December of that year [Tr. p. 821, fol. 895], Wellborn suggested certain changes in said agreement and submitted to Black his proposed form thereof, which Black executed and returned to Wellborn [Ptfs. Exh. 5, Tr. pp. 1068, 231 and 838]. This writing

is the document which the trial court has found was executed by the parties in evidence of their agreement [Tr. p. 154].

This writing does not specifically identify the subject matter of the grant. It does not say that the license is limited to the inventions of the patents and applications whose serial numbers are enumerated. The identifying description is phrased in *broad, comprehensive*, and *general* language. The *granting clause* states that Black "hereby grants * * * the right, privilege and license to use * * * any and all of the *above mentioned* inventions, processes, and apparatus, and *any and all improvements thereto*, and *inventions of a similar nature* which may be hereafter made by the licensor" [Tr. p. 1070]. This form of reference immediately provokes an inquiry as to which of Black's inventions are included within the language *"the above mentioned"* inventions, processes and apparatus.

An examination of the writing reveals that *"above"* the granting clause, Black's inventions are *"mentioned,"* and in this order (1) as those which Black owns; (2) as those which are new and useful for the extraction of gasoline from petroleum; (3) as those by means of which an amount of gasoline in addition to the natural gasoline content of the petroleum can be extracted by cracking the oil; (4) as those with respect to which three letters patent have issued and ten applications for patent are pending under serial numbers there enumerated; (5) as those which are of the nature and character of the inventions revealed by the serially enumerated patents and applications, and (6) as those of which certain ones were then in use by the licensee [Tr. Vol. IV, p. 1068, line 31, to p.

1069, line 3; p. 1069, lines 7 to 13; p. 1069, lines 14 to 18; and p. 1070, line 4].

During the eleven-years period which began in 1927 and ended on August 6, 1938 (nearly seventeen months after respondent succeeded to this license), the inventions of this application No. 599,403 were in continuous use at the licensee's cracking plant at Watson, California, successively (1) *by the licensee*—Pan American Petroleum Company; (2) *by its receiver and trustee* in bankruptcy; (3) *by its reorganization trustee under* said 77-B proceedings, and (4) *by this respondent.*

On August 6, 1938 (about seventeen months after respondent succeeded to this license) respondent discontinued the use of the original cracking unit at this refinery, and began to operate a new cracking unit which it had erected at that refinery during the preceding seventeen months. In this new cracking unit *respondent has continuously used, and is now using, the inventions of this application No. 599,403.*

An examination of this writing reveals that of Black's companion applications based upon the same basic inventive conception, said serial No. 596,837 *is included,* and said serial No. 599,403 *is omitted* in the enumeration of the serial numbers of patents, and applications for patent, to which reference is made "*in respect of the nature and character*" of Black's cracking inventions, processes, and apparatus, which are of the subject matter of said license.

The evidence shows, as the trial court has found, that this omission inadvertently occurred in the preparation of the writing in evidence of the original license granted by Black to said parent company in October, 1924, and was unconsciously carried over into this writing by the

use of the serial numbers therein enumerated, and of the applications filed between the dates of the two writings [Tr. p. 159].

Black did not discover the omission of this serial No. 599,403 in the enumeration of serial numbers in said writing of September 15, 1925, or that anyone would claim that under the pattern of this writing the inclusion of all of the serial numbers of Black's patents and applications was necessary to the inclusion of the inventions thereof in the license he had granted, until so informed by respondent during the month of October, 1938, and at all times prior to that discovery Black was unconsciously ignorant of that omission [Tr. p. 158].

In December, 1925, Black sold all of his cracking inventions to the Gasoline Products Company, but reserved his interests under this license [Tr. pp. 159, 160].

For a considerable period prior to March 12, 1937, said Pan American Petroleum Company, and the Richfield Oil Company of California which in July, 1928 had acquired about ninety-eight per cent of the stock of said Pan American Company, were in bankruptcy and receivership in the United States District Court at Los Angeles, and William C. McDuffie was the trustee and receiver therefor [Ex. 48, Tr. p. 156].

As such trustee and receiver, *McDuffie adopted and assumed this contract* of license between Black and said Pan American Petroleum Company [Stip. Ex. No. 11, p. 4, Art. 11, pars. 1 and 2; Tr. pp. 24 and 157].

Subsequent to the adoption of said contract by said trustee and receiver, proceedings were initiated for the reorganization of said corporations as provided in Section 77-B of our National Bankruptcy Act. For said pur-

pose, said McDuffie was appointed *Reorganization Trustee* of said Pan American Petroleum Company, and *as such trustee he adopted and assumed said contract of license* [Stip. Ex. No. 11, p. 4, Art. 11, pars. 1 and 4].

For the purposes of said reorganization plan, the Rio Grande Oil Corporation (an existing corporation) was reorganized; its name was changed to "Richfield Oil Corporation," and it became the "New Company" (the respondent here) under a plan of reorganization which was approved by said United States District Court by its order of confirmation made on December 23, 1936 [Ex. 48, Tr. p. 157].

By this plan and order *there is an express assumption by this respondent* of all of the liabilities and obligations of the Receiver and Trustee of said Pan American Petroleum Company, under this executory contract of license [Tr. p. 157, Ex. 48].

Pursuant to and in accordance with this order, and as of March 12, 1937, this respondent and the Reorganization Committee executed a Contract of Assumption by which *this respondent expressly assumed and agreed to perform this executory contract* [Stip. Ex. 21-A, Art. 3, 1st par. and Trial Court's Findings Tr. p. 157]. This Contract of Assumption provides in Article 5, sub-article (b) that the assumption of liabilities under said Article 3 is made expressly for the benefit of third persons.

This respondent had knowledge [testimony of Adams, Tr. pp. 899-901, incl.; Davis, Tr. pp. 780-786, incl.; Ragland, Tr. pp. 855-860, incl.] *before it succeeded to this license*, of the facts:

(1) that on July 21, 1931 Patent No. 1,815,428 had issued on Black's enumerated application No.

596,837, and that this application and patent revealed Black's Basic Chrome Alloy invention, and specifically covered Black's claim of the adaptation of that invention in a digester, "*preferably tubular in form*," composed of chrome alloy, in cracking petroleum;

(2) that the debtor, and its reorganization trustee, were actually using a *tubular container* composed of chrome alloy, in their petroleum cracking operations at Watson, California; and

(3) that on December 6, 1936, the United States Court of Appeals for the District of Columbia, had declared the patentability of Black's chrome alloy inventions as revealed and claimed in Black's application No. 599,403, *covering this very adaptation* of Black's chrome alloy invention (*a tubular cracking container*) *then in use by the debtor and its reorganization trustee.*

For seventeen months after respondent succeeded to this license, it conducted this business as did the debtor and its trustee theretofore, and *continued the use* that had theretofore been made by the debtor and its trustee, of the inventions of this application No. 599,403, in the debtor's cracking plant at Watson, California. Sixteen months of this period followed the issuance of a patent upon this application and respondent's knowledge thereof.

At the end of that period respondent discontinued the payment of royalty, *but continued its use of the inventions of this application* and patent in its cracking operations. Respondent denied this use in its verified answer [Tr. Vol. 1, par. 15, p. 32], but later conceded the fact in open court, before Judge Holzer, to prevent a pre-trial examination of its plant by Black.

The Contested Issues.

Your petitioner contends and respondent denies:

(1) that upon the proper interpretation of this writing of September 15, 1925, under the California rule (which is the universal rule) the inventions of this application No. 599,403 are included in the grant, because *the parties actually intended* the grant to include all of Black's inventions of the *nature* and *character* of those illustrated by the patents and applications serially enumerated, and (1) this intention may be reasonably deduced from the broad, comprehensive, and general language of this writing, and (2) in any event, it is not repugnant to the language used;

(2) that if an interpretation of the writing *in the light of the actual intention* of the parties may be denied, nevertheless, the writing should be reformed as against this respondent so as to express the actual intention of the parties, because the writing would be so reformed as against the debtor and the debtor's trustee: the respondent stands here in the shoes of the debtor and of the trustee, and holds this executory contract in exactly the same conditions, subject to the same burdens and plights, as did the debtor and the trustee;

(4) that your petitioner's right to reform this writing was not lost by his failure to file a claim for reformation in the debtor's reorganization proceedings, because, under the law, *a claim does not arise* in such proceedings upon an executory contract that has not been rejected, but has been expressly assumed by the reorganization corporation: and

(5) that (if a reformation is required) *your petitioner is not estopped* to reform this writing by his failure to file a claim for reformation in said proceedings, because (1) your petitioner did not have any information until nearly seventeen months after the close of those proceedings, sufficient to arouse any suspicion that the serial number of this application No. 599,403 was omitted from the writing, or that its enumeration under the broad pattern of this writing was necessary for the inclusion of the inventions of this application in the grant of the license; and (2) in the absence of such information, this petitioner was under no legal duty to inquire as to the sufficiency of that writing to express the intention of the parties *as understood and acted upon* by them during the preceding twelve years.

The Judgment Below.

Upon the trial of this cause the Honorable Trial Court received and considered *extrinsic evidences of the actual intention and conduct of the parties,* and found, as matters of fact:

(a) that in the execution of this writing *it was the intention of the parties* to evidence a grant by Black to Pan American Petroleum Company of a non-exclusive license for the use of *all* of Black's inventions useful in the business of the licensee, *including the inventions disclosed in said unenumerated application No 599,403* and all improvements thereto and all

inventions of a similar nature which Black might thereafter make [Tr. pp. 161, 163, 164, 176];

(b) *that it was always the understanding and belief of the parties* to this writing that by their execution thereof they had evidenced their intention to include all of said inventions within the scope of said license;

(c) that during the interval of *nearly twelve years* between the execution of said writing (September 15, 1925) and respondent's succession to the licensee's interest therein (March 12, 1937), and for seventeen months after respondent succeeded to this license (March 1937 to October 1938), *the conduct of all the parties conformed fully to that intention, understanding and belief* [Tr. pp. 159, 164];

(d) that *Black was unconsciously ignorant* of the omission from said writing of the serial number of said application until informed thereof by respondent during the month of October, 1938 [Tr. pp. 159, 180 and 10]; and

(e) that the facts fully justify a reformation of this writing *as between the original parties* thereto, so as to clearly express the actual intention of the parties to include in said writing all of Black's inventions of the class described, including the inventions of said application No. 599,403 [Tr. p. 167, 168, 169, 183, 184].

The trial court held, and the Honorable Ninth Circuit Court of Appeals has affirmed (Hon. Albert Lee Stephens, Judge, dissenting):

(1) that your petitioner's right to reform this writing was barred by his failure to file a claim for its reformation in the licensee's reorganization under Section 77-B of the National Bankruptcy Act;

(2) that respondent succeeded to this unrejected executory contract as an innocent third person for value;

(3) that it is a reasonable deduction from the face of this writing that the parties intended to limit the grant to the inventions of the serially enumerated patents and applications, and that, as a matter of interpretation, this intention must prevail over the actual intention of the parties as found by the trial court, because, under California law, *"the language of the contract must govern* its interpretation;" and

(4) that your petitioner is *estopped* to reform this writing as against respondent, because your petitioner did not file a claim for such reformation in said reorganization proceedings, notwithstanding your petitioner's ignorance during said proceedings and for sixteen months thereafter, of the omission of said serial number 599,403 from said writing, and of the fact that anyone would ever claim that its inclusion was necessary to bring the inventions of that application within the grant of the contract of September 15, 1925.

Questions Stated.

I.

When one of two parties to an executory contract in writing is reorganized in proceedings under Section 77-B of our National Bankruptcy Act, wherein the contract is not rejected but is expressly assumed, is the other party's right to reform that writing barred by the final order of confirmation in event he does not file a claim for reformation in these proceedings?

II.

Does a reorganization corporation in proceedings under Section 77-B of the National Bankruptcy Act take and hold an unrejected executory contract which it has expressly assumed, as an innocent third person for value, or does it stand in the shoes of the debtor and take the contract *cum onere*, in the same plight in which the bankrupt held it?

III.

In the interpretation of a writing under California law, must the actual intentions of the parties, as found by the trial court, be rejected when that intention is not repugnant to the language used, but a different intention may be deduced from the language of the writing?

IV.

Assuming that under the pattern of this writing the enumeration of serial No. 599,403 was required in order to include the inventions of that application in the grant, is Black estopped under California or federal law to seek a reformation of the writing in the hands of respondent, because, before the termination of said 77-B proceedings, he did not discover said omission, or the necessity for the inclusion of said number, and file a claim for the reformation of the writing?

Reasons for Allowance of Writ.

Your petitioner respectfully represents that a writ of certiorari should be allowed for the following reasons:

AS TO QUESTION NO. I.

A.

The Decision of the Ninth Circuit Court Upon This Question Is Directly Opposed to a Decision of the Fourth Circuit Court in Consolidated Gas, etc. Co. v. United Railways, etc., Decided April 6, 1936, and Reported in 85 Fed. (2d) 799 (Certiorari Denied, 300 U. S. 663; 81 L. Ed. 871).

In the case at bar the Ninth Circuit Court has held that Black had an opportunity to assert his right to reform this writing in the licensee's 77-B proceedings, and that having failed to do so, his claim is barred by the order of confirmation in those proceedings.

In the *Consolidated Gas Co.* case, *supra*, the Fourth Circuit Court has held that a claim does not arise under an executory contract within the meaning of Section 77-B of the National Bankruptcy Act unless and until that contract has been rejected.

This holding of the Fourth Circuit Court has not been criticized in any decision within our knowledge. It was affirmed in principle: (1) on April 5, 1937, by the Second Circuit Court, in *In re United Cigar Stores Co. of America*, 89 Fed. (2d) 3, 5, wherein that Court held that "*an executory contract * * * will serve as the basis for a claim if rejected by the trustee in bankruptcy,*" and (2) on April 15, 1940, by the Second Circuit Court, in

Mohonk Realty Corp. v. Wise Shoe Stores, 111 Fed. (2d) 287, 290, wherein that court held that *"a landlord may not be a creditor with a provable claim until his lease is rejected, * * * and at such time he becomes a creditor with a provable claim * * * a landlord is entitled to insist that his lease be rejected or fully assumed under the plan."*

The decision of the Fourth Circuit Court in the *Consolidated Gas Co.* case, *supra,* was expressly approved and followed by the Supreme Court of Arkansas on November 10, 1941, in *Ark. Fuel Oil Co. v. Pace,* 202 Ark. 52, 57, 59.

B.

The Question Presented Here Is an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Honorable Court.

The extreme importance of this problem in the administration of the Bankruptcy Act, is obvious, and the necessity for the settlement of such problems by this Honorable Court is a well recognized ground for review. (*Price v. Guerney,* Sup. Ct. Law. Ed., Adv. Opin., Vol. 89, No. 8, pages 524, 526, Oct. Term 1944.)

The principle involved in this question is of very great practical and economic importance. Since the decision in the *Consolidated Gas etc.* case, *supra,* in 1936, and the denial of certiorari by this Honorable Court, it has been standard theory and practice in 77-B proceedings to expedite the consummation of the debtor's reorganization

by avoiding the litigation of claims which might be urged in respect of the scope and meaning of an executory contract which has not been rejected, but which has been adopted by the reorganization trustee and assumed by the reorganization corporation. (Vol. 8, Corp. Jur., Sec. 860, p. 1829; Vol. 2, Gerdes on Corp. Reorg., Sec. 715, p. 1178 and Sec. 954, p. 1548.)

Sound public policy requires that a party to an executory contract that has not been rejected but has been assumed by the reorganization trustee in proceedings under 77-B, shall not be required, in order to avoid the danger of losing his rights, to explore, anticipate, and litigate, in those proceedings every eventuality which might arise, but which has not arisen, and as to which he is unsuspicious and uninformed.

Unless this question is settled by this Honorable Court, the hopeless uncertainty and confusion engendered by these conflicting opinions of our Circuit Courts, will vitally disturb the stability of contractual relations; disrupt the orderly and expeditious administration of our bankruptcy laws; tend to congest the calendars of our inferior tribunals and cast a cloud upon thousands of executory contracts that, *unrejected,* have been assumed by the reorganization corporation upon the theory, as declared by the Fourth and Second Circuit Courts, as aforesaid, that these contracts pass to, and are held by, such reorganization corporations, exactly the same as though held by the debtor.

AS TO QUESTION NO. II.

A.

The Ninth Circuit Court in the Case at Bar, Has Decided an Important Federal Question in a Way Which Conflicts With the Applicable Decisions of This Honorable Court.

The Ninth Circuit Court has held in the case at bar that respondent succeeded to this executory contract as an innocent third party for value, and holds it free of any claim for its reformation.

This holding is directly opposed to the holdings of this Honorable Court in *Zartman v. First National Bank*, 54 L. Ed., pp. 419, 420, 216 U. S. 134; *Hurley v. A. T. & S. F. Ry.*, 213 U. S. 216; *Hewit v. Berlin Mach. Wks.*, 48 L. Ed. 986, 194 U. S. 296, and *York Mfg. Co.* case, 50 L. Ed. 782, 785, 201 U. S. 344, 353.

It will be remembered that in its succession to the bankrupt's estate in this executory contract, respondent was required to and did expressly assume the liabilities and obligations of the receiver and trustee of the debtor under this contract [Tr. p. 157, Exh. 48; Exh. 21-A, Article 3, first par.], and that this contract had been assumed by said trustee [Tr. pp. 24, 157].

In the *Zartman etc.* case, *supra*, this Honorable Court said that "*the trustee claims that he takes the same kind of title as a bona fide purchaser for value; but the rule applicable to this and all similar cases is that the trustee takes the property of the bankrupt, not as an innocent pur-*

chaser, but as the debtor had at the time of the petition, subject to all valid claims, liens and equities."

In the *Hurley etc.* case, *supra*, this Honorable Court held that:

> *"Under the present bankrupt Act, the trustee takes the property of the bankrupt in cases unaffected by fraud in the same plight and condition that the bankrupt himself held it and subject to all the equities impressed upon it in the hands of the bankrupt. * * *."*

In the *Hewit* case, *supra*, this Honorable Court held that:

> *"the bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues."*

In the *York Mfg. Co.* case, *supra*, this honorable court held that:

> *"under the present bankruptcy act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt."*

B.

The Decision of the Ninth Circuit Court of Appeals in This Case Upon This Question Is in Conflict Also With Other Applicable Decisions of the United States Circuit Courts of Appeal.

In *Greif Bros. Cooperate Co. v. Mullenix*, 264 Fed. 391, 397, the Eight Circuit Court held that:

> *"when the trustee in bankruptcy by order of the Referee or of the Court, elects to ratify, confirm, and adopt the executory contract of the bankrupt, he thereby assumes the liabilities of the bankrupt thereunder, and takes the contract in the same plight in which the bankrupt held it."*

In *Johnson v. Kiern*, 95 Fed. (2d) 629, 633, the Eighth Circuit Court held that:

> *"an adjudication in bankruptcy absolves from no agreement, terminates no contract, and discharges no liability."*

In *Schultz v. England*, 106 Fed. (2d) 764, 768, the Ninth Circuit held that

> *"it is elementary that the trustee stands in the shoes of the bankrupt * * * and can assert no greater rights against the landlord than could have been asserted by the bankrupt in the absence of bankruptcy proceedings."*

This question presents a very important principle of law. The uniformity and clarity with which it has heretofore been held that one who succeeds to a bankrupt's executory contract does so *cum onere*, and thereafter holds said contract exactly as did the bankrupt, has established a basis for business transactions which will be vitally disrupted and confused by the conflicting decision here of the Ninth Circuit Court.

AS TO QUESTION NO. III.

A.

The Decision of the Ninth Circuit Court Upon This Question of California Law Is Directly Opposed to the Settled Law of That State, as Declared in the Applicable Decisions of Its Appellate Courts.

The Ninth Circuit Court has held, in the case at bar, that under California law, where the language of a writing imports an intention, such language is controlling in the interpretation of the writing, and effect may not be given to the actual intentions of the parties as deduced from extrinsic evidences, notwithstanding that *such actual intention is not repugnant* to the language of the contract, and actually governed the conduct of the parties consistently for nearly twelve years.

The Supreme Court of the State of California, in *Lemm v. Stillwater etc.*, 217 Cal. 481, has declared the law of that state to be that in the *interpretation* of a writing:

> (a) The court will *"look to the circumstances surrounding the parties at the time they contracted * * *, including the object, nature and subject matter of the agreement * * * and the preliminary negotiations between the parties, and thus place itself in the same situation in which the parties found themselves at the time of the contracting";*
>
> (b) *"If the provisions of the contract as a whole are susceptible of an interpretation which will give effect to the mutual lawful intention of the parties as it is thus found to have existed at the time of contracting, the court is bound to give to them that interpretation;* and
>
> (c) *"that this duty remains even though another and different intention is also readable therefrom."*

In *Mitau v. Roddan*, 149 Cal. 1, at p. 14, the Supreme Court of the State of California reversed the trial court and held that:

> *"the practical construction placed upon the contract by the parties themselves * * * from the very beginning, and during the years while the terms of the contract were being harmoniously carried out by the parties * * * renders it immaterial to consider what might be the literal construction of its terms."*

In *Universal Sales Corp. v. Cal. etc. Mfg. Co.*, 20 Cal. (2d) 751, 762, the Supreme Court of California held that:

> *"in its execution every executory contract requires more or less of a practical construction to be given it by the parties, and when this has been given, the law, in any subsequent litigation which involves the construction of the contract, adopts the practical construction of the parties as the true construction, and as the safest rule to be applied in the solution of the difficulty."*

In the same case, at page 761, said court held that:

> *"the reason underlying the rule is that it is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract."*

In the very late case of *Johnston v. Landucci*, 21 Cal. (2d) 63, at 69, the Supreme Court of California held that *"a possible and reasonable interpretation * * * considered apart from the evidence" of the practical construction of the contract by the conduct of the parties, "is not inevitable," and must yield to a "more reasonable interpretation in view of the evidence" of the conduct of the parties.*

In *Saunders v. Clark*, 29 Cal. 300, 304, the Court said that:

> "the *real intention of the parties, * * * when accurately ascertained, must always prevail over the literal sense of terms.*"

These applicable decisions of the Supreme Court of California have never been criticised or modified. They have been uniformly approved.

The applicable decisions of the Appellate Courts of California also hold that, in the interpretation of a writing, this recourse to, and use of, extrinsic evidences of actual intention, do not vary the meaning of the writing, or add anything to it. They merely make that meaning plain (*Lewis Pub. Co. v. Henderson*, 103 Cal. App. 425, 428), and that reformation is not required to ascertain the meaning attached to a word or phrase in a contract, *or to identify the property* which is of the subject matter thereof, as these particulars involve the construction or interpretation and not the reformation of the contract. (*House v. McMullen*, 9 Cal. App. 664, 673.)

In California it is settled law, as stated in Restatement of the Law of Contracts, Section 242, that:

> *"even where the writing is not ambiguous on its face, the circumstances under which the parties contract may be looked at * * * to indicate the proper choice of possible meaning; and the common knowledge and understanding of the parties is sometimes such a circumstance."* (*Weinstein v. Moers*, 207 Cal. 534; *Tenant v. Wilde*, 98 Cal. App. 437, 453.)

Other applicable and helpful decisions of the Appellate Courts of California are *Perry v. Gross,* 172 Cal. 468, 469; *Imp. Co. v. Cal. etc. Ltd.,* 29 Cal. App. (2d) 260, 273; *Norton v. Farmers etc.,* 40 Cal. App. (2d) 556, 562; *Body-Steffner Co. v. Flotill Products,* 63 A. C. A. 712, 719; *Palma v. Leslie,* 6 Cal. App. (2d) 702, 709, and *Gilde v. Schuster,* 83 Cal. App. 537.

The majority opinion of the Ninth Circuit Court, in the case at bar, upon this question, stems from the conception that recourse to the actual intention as found by the trial court, is denied by Section 1858 of the California Code of Civ. Proc., and by such cases as *Wright-Callender-Andrews Co. v. Eaton,* 47 Cal. App. 685, 688, and *Palm Springs etc. Co. v. Palm Springs etc. Co.,* 36 Cal. App. (2d) 730. This conception ignores the fact that this section must be construed with Sections 1856 and 1860 of the same code, and Sections 1636, 1638, 1650 and 3500 of the California Civil Code, and that the cases there referred to hold no more than that *an intention* (as shown by the parol evidences), *which cannot be reconciled with the language* of the instrument, must yield to the language used.

The actual intention of the parties as discovered from parol evidences, was rejected in each of the cases cited in the majority opinion in the case at bar, because such actual intention *is not readable from the language of the contract viewed by its four corners.* In illustration of this it will be noted that in the case of *Wright-Callender-Andrews Co. v. Eaton, supra,* cited in the court's opinion here, the

subject matter of the contract as written was *"real property completely furnished,"* and the subject matter sought to be included was an *"automobile."* Since an automobile *was wholly repugnant* to the furnishings of real property it was rejected. In the case of *Palm Springs etc. Co. v. Palm Springs etc. Co., supra*, the subject matter stated was land which the *"vendor then owned,"* and the court rejected a subject matter of land which the *"vendor did not then own,"* because the two *were wholly repugnant* to each other.

Those cases do not apply here, because here *the actual intention*, as found by the trial court, to include within the grant the inventions of Black's application No. 599,403, *is entirely consistent with the language* used in the writing. The grant here is as to all of Black's *"above mentioned inventions, processes and apparatus."* The "above mentioned inventions," *i.e.*, those *mentioned above the grant*, are those inventions of Black's which *were "useful for the extraction of gasoline from petroleum,"* and which were of the *"nature and character"* of the inventions revealed in the enumerated patents and applications.

The inventions of this application No. 599,403 are embraced in this reference because they *are useful* in the extraction of gasoline from petroleum; they were in use by the licensee, and *they are of the nature and character* of the inventions of the enumerated patents and applications. In fact, this application and the patent issued thereon state that the inventions there revealed *are an im-*

provement upon the inventions revealed in the enumerated application No. 596,837 issued as Patent No. 1,815,428 on July 21, 1931.

Your petitioner's position has been approved by three of the five judges who have served in this case. Originally this case was before District Judge Hollzer. He held [Tr. p. 102] that *"hence it becomes clear" that "the parties to the license agreement thought and meant that said contract covered and should cover the process or* processes actually used". This case was then transferred to District Judge Harrison for trial, and upon the trial he stated his concurrence in the views of Judge Hollzer (Tr. p. 203, line 6; p. 4641; p. 1000, line 19;, and p. 1002, line 12]. Later Judge Harrison, under the influence of the cases of *Wright etc. v. Eaton, supra,* and *Palm etc. v. Palm etc., supra,* changed his mind and held that he was bound by the *"literal sense"* of the language used. Heretofore, by applicable authority, we have shown that the *"literal sense"* of the language is not controlling, but must yield to the actual intentions of the parties where such actual intentions are not wholly repugnant to the language of the instrument. Upon the Circuit Court Judge Albert Lee Stephens in the case at bar, has dissented upon this ground, and has held that this writing should be construed *in the light of the actual intention* of the parties as found by the trial court, and an accounting should be ordered. Judge Stephens' long service and commendable record as a trial and appellate judge in the

California courts, before his elevation to the federal bench, strongly commend his conclusions upon this question.

These impressions are of controlling importance (*Lock Joint etc. v. Melber*, 234 Fed. Rep. 319; *Gilde v. Schuster*, 83 Cal. App. 537). In the *Lock Joint etc.* case, *supra*, the Third Circuit Court said that in the presence of such "*opposite views there must be a question with two distinct sides, and the language out of which such a question arises must be ambiguous indeed.*"

This question, and its proper solution, is of very great importance. A holding here in accord with the holdings of the California Appellate Courts in applicable decisions, will end this case, because the other questions presented apply only to the remedy of reformation, and the proper interpretation of this writing renders reformation unnecessary. Upon the other hand, if this decision of the Ninth Circuit Court stands, it will deny to Black his right to the benefit of the law of California wherein that law is controlling, and it will establish a false precedent upon this important question of contract law, which will embarrass federal trial tribunals hereafter until the error is rectified.

This Califonia and federal rule is of general recognition. (See *Restatement of the Law of Contracts*, Vol. 1, Sec. 235, p. 319, sub. D, Com. A; *Williams on Contracts* (Rev. Ed. 1936), Vol. 3, Sec. 607, p. 1740; *Wigmore on Evid.* (3rd Ed.), Vol. 9, p. 227; 22 C. J., Sec. 1685, p. 1269; *Ruling Case Law*, Vol. 6, Sec. 239 p. 849.)

B.

The Decision of the Ninth Circuit Court in the Case at Bar, Upon This Question, Is in Conflict With the Applicable Decisions of This Honorable Court.

In *Merriam v. United States*, 107 U. S. 437, at 441, this court stated the applicable rule as follows:

> *"It is a fundamental rule that in the construction of contracts the courts may look not only to the language employed, but to the subject matter and the surrounding circumstances, and may avail itself of the same light which the parties possessed when the contract was made."*

AS TO QUESTION NO. IV:

A.

This Decision of the Ninth Circuit Court Upon the Principle Involved in This Question, Is in Conflict With the Applicable Decisions of the Appellate Courts of the State of California, and of the United States.

The decision of the Ninth Circuit Court in this case, holds that Black is estopped to seek a reformation of this writing. This holding is unsupportable upon the record here, because it clearly appears therefrom that the indispensible elements of Black's estoppel are wholly lacking.

The estoppel invoked rests upon the unfounded conception that Black was *culpably* negligent (1) in his failure to discover before the close of said reorganization proceedings, that said serial No. 599,403 was not enumerated in said writing, and that its enumeration was necessary (if such it were) if the inventions of that application were to be included in the grant; and (2) in his failure to file a

claim for the reformation of said writing in said proceedings.

The rule in California, as declared by the applicable decisions of its Appellate Courts, is that negligence, in order to bar a reformation, must be so gross as to constitute a *"neglect of legal duty."* (*Los Angeles, etc. v. New Liverpool,* 150 Cal. 21, 27, 28.)

In *Union Ice Co. v. Doyle,* 6 Cal. App. 284, 293, the court stated the rule to be that *"the neglect must amount to the violation of a positive legal duty,"* and that *"It should clearly appear, in order to impute laches to one seeking the relief, that he had knowledge, or failed to obtain knowledge where it was obtainable after notice, or that there should be circumstances which should have induced an inquiry and an effort to obtain knowledge."*

This rule has been uniformly approved by the authors and the courts. Mr. Pomeroy, in his work on Equity Jurisprudence, Sec. 856, said *"The conclusion from the best authorities seems to be that the neglect must amount to the violation of a positive legal duty."* In *Sanders v. Monroe,* 10 Fed. (2d) 997, 999, the court said that *"to justify the withholding of equitable relief because of failure to read an instrument, the negligence must be so gross as to amount to a failure of a positive legal duty."* In *Skelton v. Fed. Ins. Co.,* 15 Fed. (2d) 756, 759, the Eighth Circuit Court said *"Mere negligence, not amounting to a violation of a positive legal duty, does not prevent reformation."* This rule was applied by the Honorable

Ninth Circuit Court in *Shields v. Mongollon, etc. Co.*, 137 Fed. 539, 549. See also *United States v. Work*, 13 F. (2d) 303. See, also, *London etc. Co. v. Dexter, etc.*, 126 Fed. 593, 601; *Gen. Motors Corp. v. Swan, etc.*, 88 F. (2d) 876, 887.

It has been frequently held in California that *"reformation may be decreed at the instance of a party who failed to read an instrument he signed, in order to correct a mistake which a reading of the instrument would have disclosed."* (Restatement of the Law of Contracts, Sec. 508; *Los Angeles & Redondo R. R. Co. v. New Liverpool Salt Co.*, 150 Cal. 21; *Romano v. Seibt*, 95 Cal. App. 586; *Cantlay v. Olds, etc.*, 119 Cal. App. 605); that the failure of a party who reads the writing but fails to perceive the mistake, does not preclude a reformation of the contract at his instance. (*Sullivan v. Moorhead*, 99 Cal. 157); that even though an omission is patent upon the face of an instrument, the mere fact that a party fails to discover it does not charge him with laches (*Danielson v. Neal*, 164 Cal. 748); that the duty of inquiry is exacted only in favor of innocent parties (*Hart v. Walton*, 9 Cal. App. 502); that a failure to discover the mistake until thirteen years after the exchange of deeds does not bar the remedy (*Breen v. Donnelly*, 74 Cal. 301), and that the Statute of Limitations does not begin to run until a discovery of the mistake (Cal. C. C. P., Sec. 338, subd. 4).

Under the rule as stated and applied in the foregoing cases, an estoppel requires the concurrence of a *culpable* negligence on the part of the person to be estopped, and a *permissible* ignorance on the part of the person for whose benefit the estoppel is invoked. *Both of these conditions are absent here.*

BLACK WAS NOT CULPABLY NEGLIGENT.

Black did not know and had no reason to know that anyone would ever claim that any of his cracking inventions was not of the subject matter of this license. Nothing had occurred to arouse even a suspicion that such a claim would ever be made. Black knew that these inventions were in use by the debtor and its trustee. He knew that they knew that the *contract as made* covered these inventions, and that the debtor believed, as he did, that the writing they had signed covered all of Black's cracking inventions. Black knew that this respondent had examined the debtor's cracking plant, and that such an examination would reveal, *as it did*, the use of these inventions. He knew that respondent had caused an examination of the patent situation to be made by its competent patent counsel. He knew that such an examination would reveal, *as it did*, the fact that his chrome alloy inventions were the subject of a patent monopoly under the patent that had issued in 1931, upon his application No. 596,837, and the patent that would issue shortly upon his companion application No. 599,403, under said decision by the Court of Appeals for the District of Columbia. He knew that an inquiry of any of the officers and employees of the debtor and its trustee, and the records of the debtor and its trustee, would disclose the mutual understanding that *all* of Black's cracking inventions were under this license. *Nothing was asked of Black.* In these circumstances Black was *unconsciously ignorant* of any necessity for the reformation of this writing. This constitutes *"mistake"* as defined by section 1577 of the California Civil Code, and is the predicate of a permissible reformation. Black was not guilty of any *culpable* negligence, because the circumstances prescribed in section 19 of the Cal. Civil Code, which invoke a duty to inquire, were not present.

RESPONDENT IS NOT AN INNOCENT THIRD PARTY.

The decision of the Honorable Ninth Circuit Court of Appeals upon this question concludes that respondent is an innocent third person within the meaning of section 3399 of the Cal. Civil Code, but this conclusion rests upon a misconception of controlling facts and law.

Respondent *is not a third person* within the meaning of section 3399 of the Cal. Civil Code. *Respondent is the rehabilitated debtor.* It did not deal in respect of its succession to this contract as an independent person acting at arm's length. Respondent dealt in said matter under the compulsions of the Order of Confirmation and the law applicable to reorganization proceedings under Section 77-B of our National Bankruptcy Act. In these circumstances, as heretofore shown, respondent as a reorganized debtor, succeeded to the position of the trustee *(which was that of the debtor)*, in said proceedings in respect of this contract, and assumed and agreed to perform all obligations of the trustee in respect thereof. It did not purchase said contract in the market place as an independent third person. Each of these statements is confirmed by applicable authority heretofore cited and reviewed.

Respondent is not an innocent person within the meaning of said section. "*Innocence*" as comprehended by said section, means an absence of knowledge or notice, actual or constructive, respecting the phase of the subject matter involved. (Cal. Civ. Code, sec. 19.) Respondent is not free here of knowledge or notice of Black's claims upon which Black's right to reform this contract rests. Respondent stands here in the shoes of the trustee and is therefore charged, as was the trustee, *with all knowledge which the debtor* had in respect of Black's equities.

This is the law. It is affirmed in numerous cases hereinbefore referred to which say that the trustee, in whose shoes respondent stands, stepped into this contract *"subject to all equities between the original parties,"* and *"in exactly the same situation as the bankrupt himself stood prior to the adjudication."* (*Eames v. H. P. Claflin Co.*, 220 Fed. Rep. 190, 191; *Zartman v. First Natl. Bank*, 216 U. S. 134, 54 L. Ed. 418; *Coates v. Smith* (Ore.), 60 Pac. Rep. 517, 521; *Schultz v. England*, 106 Fed. (2d) 764, 768.)

Respondent's succession was not in good faith within the purview of said section of the code. This is a necessary conclusion from the fact that respondent stands here in the shoes of the debtor's trustee and is charged with the *trustee's failure* (if any) *to inquire and ascertain the true nature, character and condition of this contract before exercising his election to assume this contract* under said reorganization proceedings. *It was the duty of the trustee to make such inquiry and to ascertain such matters.* (*Atchison, T. & S. Fe Ry. Co. v. Hurley* (*supra*).) *It is presumed that official duty has been performed.* Significantly, the trustee has not said that he did not inquire, or was in anywise ignorant, as to the actual agreement of the parties.

Indisputably, an inquiry by the trustee of Black, who was then in the employ of the debtor, and of the debtor, and an observation of the debtor's cracking operations which then employed the inventions of this application No. 599,403, would have clearly revealed that Black

and the debtor had agreed and understood that the inventions of this application were of the subject matter of said license, and that the conduct of each always theretofore had comported fully with this understanding, and that the omission of the serial number of said application in the enumeration of serial numbers in the royalty group, if at all necessary or desirable for the proper identification of the specific subject matter of said license as agreed and understood by the parties, *was unintentional* and a *mutual mistake* for which Black had the right of reformation. Respondent standing in the shoes of the trustee, the shoes of the debtor, had constructive knowledge of all these facts.

Respondent did not acquire this contract for value in the sense of said section of the code. Respondent, as a rehabilitated debtor, paid nothing for that which it received. It simply stepped into the shoes of the debtor. That which it did was the same, in so far as Black is concerned, as though the debtor had done it. Black's rights and remedies were not affected. Those who became stockholders in respondent upon the investment of new funds, did so with full knowledge of the law which defined the position of respondent in respect of this contract. The contributions of capital they made to the cause of rehabilitation were subject to the hazards of all equities *known or unknown* in Black's favor in respect of this contract. This is the clear philosophy of the law of corporate reorganization as revealed in the authorities to which reference has been made.

We respectfully submit that upon the grounds stated, this petition should be granted.

Respectfully submitted,

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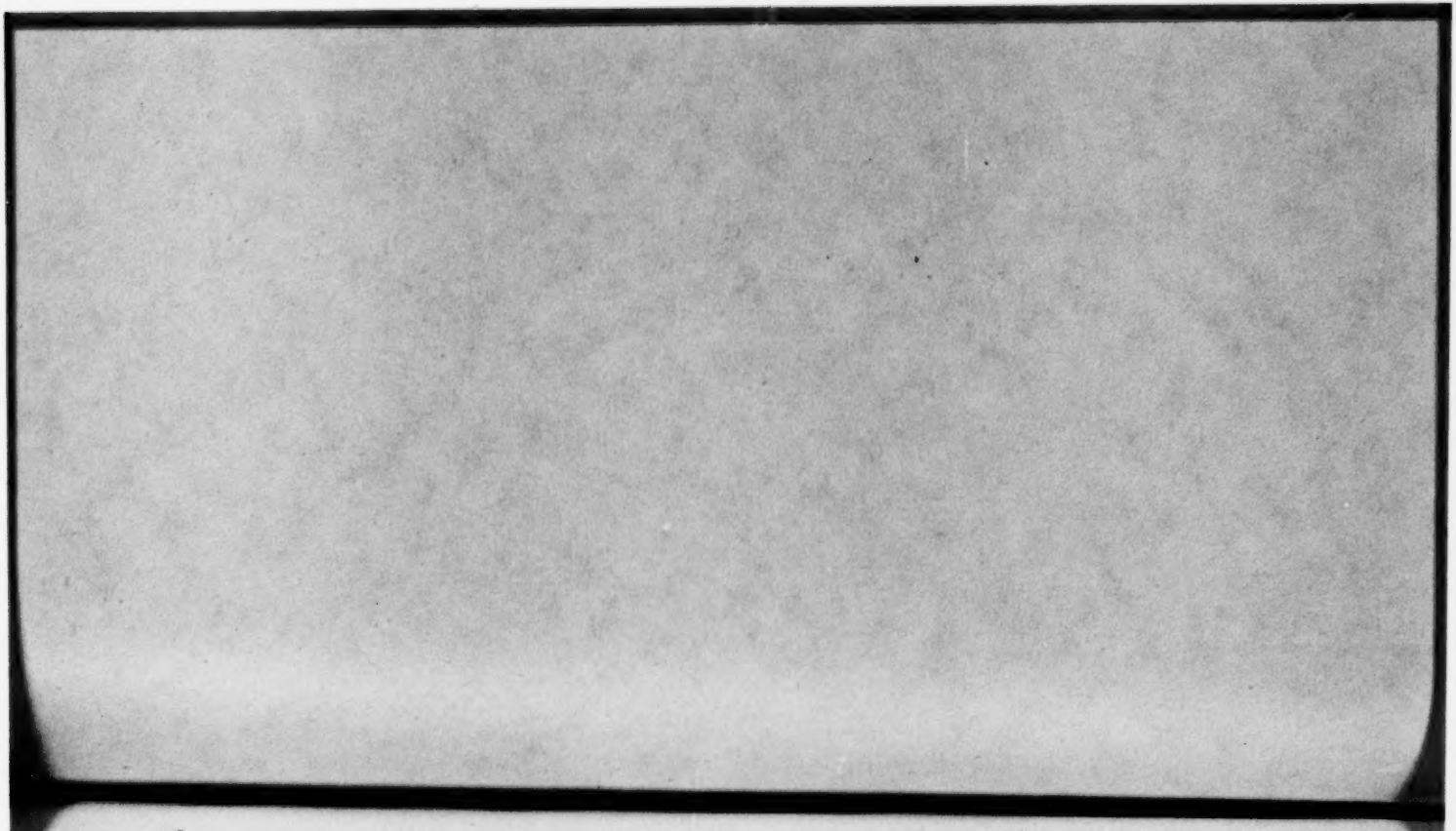
Attorneys for Petitioner.



Service of the within and receipt of a copy thereof is hereby admitted this.....day of April, A. D. 1945.

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4-20-45—60